Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1725

In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO AND LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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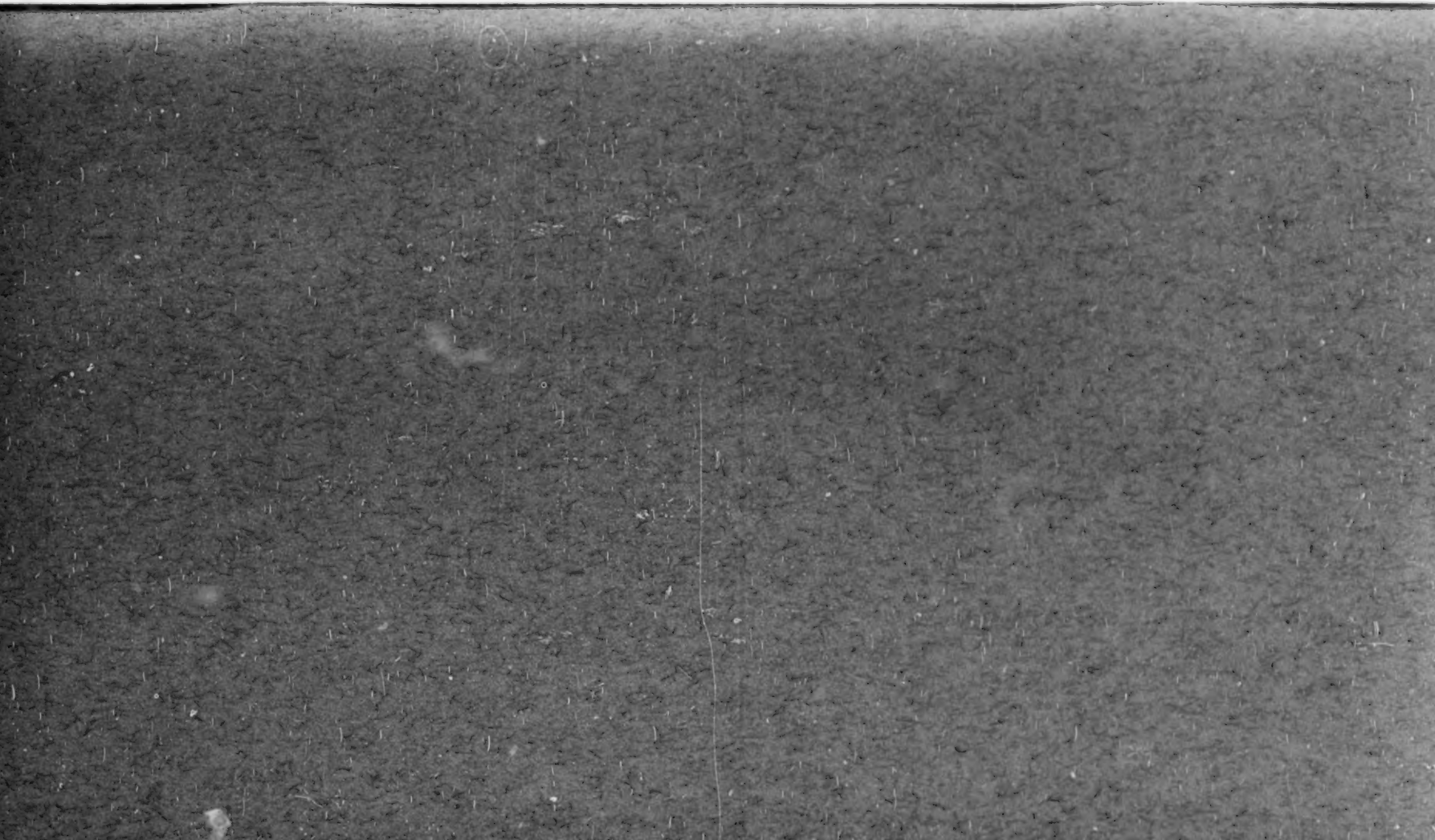

QUESTIONS PRESENTED

1. Whether misrepresentations made on a visa application were "material" within the meaning of 8 U.S.C. 1182(a)(19), warranting forfeiture of an aircraft used in violation of the statute.

2. Whether the misrepresentations in this case were sufficiently willful to warrant forfeiture.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Chaunt v. *United States*, 364 U.S. 350 (1960)	4, 5
Kungys v. *United States*, cert. granted, No. 86-228 (Nov. 10, 1986)	4-5, 6, 7

Statutes:

8 U.S.C. 1182(a)(19)	2, 5
8 U.S.C. 1324(b)	2, 7
8 U.S.C. 1451(a)	5
18 U.S.C. 1546	3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 808 F.2d 765. The opinion of the district court (Pet. App. 23-38) is reported at 617 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1987. A petition for rehearing was

denied on March 2, 1987. The petition for a writ of certiorari was filed on April 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government instituted this action for civil forfeiture under 8 U.S.C. 1324(b), alleging that crewmembers of the Lear jet at issue in this case had made material misrepresentations on their visa applications, within the meaning of 8 U.S.C. 1182 (a)(19). The district court held that the crewmembers had violated the immigration statutes by making the alleged misrepresentations. Accordingly, the court ordered the jet forfeited. The court of appeals affirmed.

1. The facts are summarized in the court of appeals' opinion (Pet. App. 1-5). Petitioner Leybda Corporation is a Panamanian subsidiary of a Nicaraguan corporation and, as the owner of the jet that is the subject of this action, challenges the forfeiture. Leybda purchased the jet in 1980 and used it as an air taxi to transport government officials. In the course of its travels in North and South America, the jet entered the United States eight to twelve times in the five-month period ending in August 1980.

On September 1, 1980, the jet again entered the United States, landing at Miami International Airport. There, the crewmembers completed immigration forms and supplied facially valid non-immigrant visas that had been issued by the United States Embassy in Managua. The crew members claimed that they were Nicaraguan citizens who had boarded the jet in Managua. They were then allowed to fly the jet on to Ft. Lauderdale.

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An investigation subsequently disclosed that all three members of the jet's crew had made false statements in their visa applications.[1] The false statements concealed the following facts: (1) that the crewmembers had resided in Cuba during the period immediately preceding their visa applications; (2) that they had previously submitted visa applications to the United States Interest Section in Havana; and (3) that they had previously worked for Cubana de Aviacion, the Cuban national airline. Pet. App. 4-5, 13-14. All three crewmembers subsequently pleaded guilty to knowingly having possessed visa applications containing false statements, in violation of 18 U.S.C. 1546.

2. The district court ordered the jet forfeited because of the misrepresentations in the visa applications. The district court found that the misrepresentations were "material" since, had the applications contained accurate information, further investigation "may have been taken and further investigation may have been made by U.S. Customs officials" (Pet. App. 34).

The district court further found that petitioner Leybda did not qualify as an "innocent owner." The court found that petitioner had not sustained its burden of demonstrating an absence of "actual knowledge," and it went on to find that "no credible evidence [was presented] that [Leybda] was not aware of the crewmembers' unlawful entry into the United States" (Pet. App. 35). In fact, the court found, the evidence supported the contrary conclusion: that Leybda "knew about the visa applications submitted

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[1] The investigation was directed at determining whether the jet was actually being operated by the Cuban government (Pet. App. 3-4).

by the three crew members and was in fact acting in concert with them" (*ibid.*).

3. The court of appeals affirmed. It held that the district court's findings of willful misrepresentations by the crew members in their visa applications were not clearly erroneous. Pet. App. 11-12. Observing that there was "little doubt" (Pet. App. 14) about the matter, the court also sustained the lower court's findings that the misrepresentations were material, since truthful responses on the visa applications might have provoked a further investigation by United States officials (Pet. App. 12). The court went on to observe that the information concealed from officials responsible for issuing the visas related to a "significant area of inquiry," with the information "mislead[ing]" officials about an area of "potential significance in the decision to grant or deny the visa" (*id.* at 16-17). The court also affirmed the lower court's finding that petitioner Leybda did not lack actual knowledge of the visa fraud (*id.* at 19).[2]

ARGUMENT

1. Petitioners' initial argument is that the court of appeals erred in failing to apply the standard of materiality set forth by this Court in *Chaunt* v. *United States*, 364 U.S. 350 (1960). Noting that the correct interpretation of the *Chaunt* test is now before the Court in *Kungys* v. *United States*, cert.

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[2] The court observed that petitioner Leybda had conceded at trial that it bore the burden of proof on whether it had actual knowledge of the visa fraud (Pet. App. 18). Although on appeal Leybda contested that allocation of the burden, the court of appeals disposed of the argument by noting that the government had offered sufficient evidence of actual knowledge to defeat petitioner's claim in any event.

granted, No. 86-228 (Nov. 10, 1986), petitioners ask this Court in the alternative to hold this case pending a decision in *Kungys*.

As we have stated in our brief in *Kungys*, we believe that the proper test for materiality under 8 U.S.C. 1451(a), a provision similar to 8 U.S.C. 1182(a)(19), requires only that the misrepresentation have the capacity to mislead the fact-finder responsible for passing upon the applicant's qualifications for a visa and/or citizenship. Stated differently, we urge that the materiality requirement can be satisfied even without a showing of ultimately disqualifying facts.

The court of appeals in this case affirmed the district court's findings that the misrepresentations were material, because if the applications had been accurate a further investigation may have been conducted regarding the relationship between the crewmembers and the government of Cuba. Pet. App. 12. Thus, under the interpretation of the materiality test we have advocated in *Kungys*, petitioners' claim would have to be rejected.

The court of appeals stated that it did not believe that the *Chaunt* test of materiality should necessarily apply where only the forfeiture of assets is involved, but the court expressed the view that if the *Chaunt* test does apply, the government's evidence would satisfy that test. See Pet. App. 15 n.5. Although, for this reason, the decision in *Kungys* may not be dispositive of the issue in this case, we believe that it is highly likely that the Court's treatment of the materiality issue will be enlightening with regard to the issue presented here. For example, if the Court agrees with our proposed definition of materiality for denaturalization cases, petitioners could not show

that they were prejudiced by the application of the similar definition employed by the court of appeals in this case. Petitioners presumably would not argue that they are entitled to prevail on their claim where the interest at stake is not denaturalization, but only the forfeiture of assets. Accordingly, because a decision on the standard of materiality to be applied under the immigration statutes might well resolve this case, we do not oppose the request that this case be held pending the decision in *Kungys*.

Petitioners also contend (Pet. 15-17) that certiorari should be granted to review whether there must be some evidence in the record showing how the particular misrepresentations would have affected the consular officials' decision whether to grant the visas or the admissibility of the crewmembers to this country. The evidence before the district court established that the crewmembers purported, in effect, to be Nicaraguan citizens with no continuing or official relationship to the government of Cuba, when in fact they were employees of the Cuban government. That evidence, together with the judicially noticeable fact of the strained relationship between the governments of the United States and Cuba, was sufficient to support the district court's finding that disclosure of the truth at the visa application stage might well have provoked an inquiry into the crewmembers' purpose for obtaining entry into this country and their eligibility for admission. As the court of appeals noted (Pet. App. 16), "[d]isclosure of the true facts on the visa applications involved in this case almost certainly would have affected the decision made in 1980 with regard to those applications by the United States Embassy in Managua." Peti-

tioners' fact-bound argument that this finding is erroneous does not warrant review by this Court.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Kungys* v. *United States*, No. 86-228, and disposed of in light of the decision in that case.

Respectfully submitted.

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JULY 1987

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[3] Petitioners also assert that the aircraft was not used for illegal purposes, arguing that only drug or alien smuggling satisfies the statutory forfeiture provision. Pet. 9. As the court of appeals noted (Pet. App. 9-11), however, the guilty pleas by the crew-members make it clear that the jet was used in the commission of immigration offenses, which carry criminal penalties. 8 U.S.C. 1324(b). In addition, petitioners contend that the courts below erred in ordering forfeiture without requiring any showing that the misrepresentations were made "willfully." While observing that the court of appeals purported to sustain the district court's factual findings on this question, petitioners nevertheless assert that no such finding had been made by the district court. Pet. 18. This fact-bound argument does not merit review by this Court, and in any event it lacks merit. Although the district court in its opinion forfeiting the jet did not explicitly refer to the false statements in the visa applications as "willful," that was clearly what the court found, as the court referred to the crewmembers' false statements as "misrepresentations" (Pet. App. 26, 28, 33, 34) and their visas as "fraudulent" (*id.* at 38).

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